and that decision related to a subject matter the value of which was in the estimation of the Legislature so low that the subsequent Court proceedings to which the decision of the Rent Assessment Board was a necessary preliminary were of necessity to be taken in a subordinate Court.

In all the circumstances of the case, I am forced to the conclusion that had the taxing officer allowed his mind to be influenced by the considerations as to the nature of the proceedings and the value and importance of their subject matter which I have set out he would not have allowed such a large fee as he did allow. The appeal is accordingly allowed and the amount of the fee under item 86 reduced to $200, that is in fact $375 when effect has been given to the percentage increases. Costs of this appeal will follow the event.

Appeal allowed.

TAN KIM MOEY (f) v. KEE BAN CHENG.

[Court of Appeal (Sir Charles Murray-Aynsley, C.J., Singapore, Pretheroe and Spenser Wilkinson, JJ.)
May 2, 1952]

[Penang — F.M. Civil Appeal No. 21 of 1951]

Dealings in Land (Occupation Period) Ordinance, 1949 s. 12 — Sale under duress — Vendor and purchaser — Constructive notice — Conveyancing and Law of Property Ordinance (Cap. 118), s. 70.

This was an appeal against the judgment of Jobling, J. reported in (1951) M.L.J. 82 — sub nomine Kee Ban Cheng v. Tabayashi Toyoji & Anor.

The Court of Appeal dismissed the appeal on two grounds — Firstly that the first defendant's title was rightly declared void on the ground of duress and in any event, the title of second defendant was void by Statute.

COURT OF APPEAL.

F. G. Pooley for the appellant.

C. D. D. Hogan for the respondent.

The facts and arguments appear sufficiently from the judgment.

Cur. Adv. Vult.

Sir Charles Murray-Aynsley, C.J. : — These proceedings arise out of two dealings with land during the occupation period. The first was a sale by the plaintiff-respondent to one Tabayashi Toyoji, a Japanese, on behalf of a Japanese company. This Japanese was made a defendant in the Court below but he was not served and has disappeared since the end of the occupation. Later the Japanese company entered into a contract of sale of the same land to one Teh Chooi Lai who resold it to the second defendant. On July 26th, 1945, the Japanese company entered into a contract of sale of the land with the second defendant. This contract was performed by the company by means of a conveyance dated August 26th, 1945. This dealing was declared void by section 12 of the Dealings in Land (Occupation Period) Ordinance No. 40 of 1949.

The plaintiff sought to have the sale to the Japanese set aside on the ground of duress. It should be noted that neither side has a legal estate. That is outstanding, since the Custodian has disclaimed in the first defendant. The second defendant claims to be a *bona fide* purchaser without notice.

The learned Judge decided the case on the ground of constructive notice. It is clear that on the sale to the second defendant the usual investigation of title took place. This did not, of course, reveal the circumstances of the earlier sale by the plaintiff.

The learned Judge considered that, in the circumstances of the occupation, special enquiries should have been made about the earlier transaction. As they were not made he found in favour of the plaintiff.

On the evidence before him. I am doubtful if this was a correct decision. I am doubtful if during the occupation it would have been possible to make the enquiries, or, if they were made, anyone would have dared to complain of duress. One is naturally chary about extending the scope of construction notice.

I think, however, that the decision can be supported on other grounds. I do not think that the defence of *bona fide* purchaser can avail to one who has not got the legal estate. In any event the dealing in its final form has been avoided by statute. When this has happened the second defendant cannot rely on the contract which was merged in the conveyance. To decide otherwise would be, in effect, to give effect to a dealing which has been avoided by statute. I think that contract and conveyance constituted one dealing and the date of the dealing is that of the conveyance.

The appeal should be dismissed with costs.

Pretheroe, J. : — The essential facts in this case are few in number. At the beginning of the Japanese occupation of Malaya the plaintiff was the owner of certain properties in Province Wellesley. On the 1st November, 1943, he conveyed these properties to a civilian Japanese who was working at Butterworth at the time. That Japanese is the first defendant in this case. In August, 1945, the first defendant agreed to sell the same properties to one Teh Chooi Lai. The latter immediately resold the properties to one Tan

Kim Moey. She is the second defendant in this case. For the sake of convenience it was agreed that the title should be passed direct from the first defendant to the second defendant, and an agreement in writing to this effect was executed on the 26th day of July, 1945. The actual conveyance, however, was not executed until the 26th Augnst, 1945.

In this suit the plaintiff's claim is for a declaration that the conveyance to the Japanese dated the 1st November, 1943, is null and void as it was compelled by duress and coercion on the part of the Japanese. He also claims certain consequential relief.

The first defendant has left Malaya and his present address is unknown. Consequently he has never been served and took no part in the trial or in the appeal.

At the trial the learned Judge gave judgment for the plaintiff and granted the relief prayed. Against this decision the second defendant has appealed.

There were six grounds of appeal but Mr. Pooley, for the appellant, abandoned the first. The second ground was that the learned trial Judge was affected by evidence which was inadmissible and irrelevant. This refers to a part of the judgment which reads as follows :—

> "But the plaintiff's evidence is that everyone was afraid of the Japanese and that it was the talk of the town that many people were complaining about their land being taken away by force by the Japanese."

Evidence to this effect was given by plaintiff and Mr. Pooley submitted that the learned trial Judge had been influenced by mere gossip. I do not consider that there is any merit in this ground of appeal as there is admissible evidence that witnesses in the case were very much afraid of the Japanese at that time and the duress alleged had to be proved in respect of those witnesses. I would dismiss this ground of appeal therefore.

The third ground was that the Judge's decision that the duress was a matter which would have come to the knowledge of defendant's Solicitor if such inquiries and inspections had been made as ought reasonably to have been made was wrong in law and against the weight of evidence. Mr. Pooley pointed out there was no evidence before the learned trial Judge to indicate that at the time of the transaction there was any need for a Solicitor to make any inquiries or inspections different from, or additional to, those commonly made by Solicitors in normal times. He also pointed out that two Solicitors, who were practising in Penang at the time, gave evidence in the case but this point was never put to them. Both statements are correct but one of those Solicitors did give some significant evidence. Mr. Goh said that he signed the certificate attached to the conveyance, which is the subject matter of this case, stating that the conveyance was made voluntarily though in fact he believed the reverse to be true. He further affirmed that if he had not signed the certificate he would have been placed in prison and that he knew of a case where a fellow lawyer omitted the word "voluntarily" from a similar certificate and he was sent for by the Japanese and compelled to insert the word "voluntarily." And later Mr. Goh stated that he inserted the word "voluntarily" in the certificate because he was frightened of the Japanese. The other Solicitor witness, Mrs. Oon, stated that she was aware that if a Solicitor omitted to insert the word "voluntarily" in a certificate he "would get into trouble." She however is the Solicitor whom the learned trial Judge found had not made proper inquiry in this case. On this evidence I consider that the learned trial Judge was entitled to find as a fact, as he did find, that the circumstances existing in Malaya in 1945, were such that, when the vendor was a Japanese subject, it was of itself sufficient to cause any Solicitor to make enquiry concerning his title.

The second point alleged by this ground of appeal is that the learned trial Judge was wrong in law in coming to this decision. It was alleged that the only evidence of what a prudent Solicitor did during the occupation was given by Mrs. Oon and this was in fact the case. But this is not a matter of evidence. A Solicitor contracts to be skilful and careful and consequently the action required of him varies in different circumstances. Mrs. Oon states that "the fact that the vendor was a Japanese did not give me any cause to make any further inquiry into the matter." The learned Judge, in effect, held that a careful Solicitor would have made further inquiry and I for one am not disposed to disagree with that decision. It follows that I would dismiss this ground of appeal.

The first part of the next ground of appeal is, I think, based on a misconception. It states that "such finding was inconsistent with the finding of the learned Judge that the transaction was an ordinary one." What the judgment says is "Mrs. Oon states, and I accept it, that she regarded the transaction as an ordinary one", i.e. he accepted Mrs. Oon's evidence as being true concerning the view *she* took of the transaction.

The fifth ground of appeal was that there was no evidence even if additional inquiries had been

made at the date of the contract that any further knowledge would have come into the possession of defendant's Solicitor as such. The significance of the last two words is that Mrs. Oon is related to the Solicitor who acted for plaintiff in this transaction.

Mr. Pooley only referred to this ground in passing the reason doubtless being that no such evidence was necessary. In the case of implied or constructive notice the Court imputes knowledge to a person when certain facts have been proved which raise the presumption. In this case the facts so proved were the conveyance to a Japanese during the occupation period.

The last ground of appeal was that the learned trial Judge did not consider the point as to whether the conveyance from the plaintiff to 1st defendant could either be avoided at the date at which proceedings were commenced or at the date of the trial. This point does not appear to have been taken at the trial. Mr. Pooley's argument was as I understood it, that a contract into which a person may have been induced to enter by false and fraudulent representation is voidable at the election of the person defrauded after he has notice of the fraud. Until he repudiates the contract it remains valid and, if in the meantime an innocent third party acquires an interest, it will terminate the right to repudiate. Mr. Pooley submitted that the same principles apply in the case of duress. Assuming that they do, the position is that plaintiff could obviously not take action in a Japanese Court alleging that the act of duress was a threat to report the plaintiff to the Japanese police. After the liberation he was prevented from instituting action by various statutory provisions, including the Moratorium, and was not free to do so until the Dealings in Land (Occupation Period) Ordinance, 1949, came into operation on the 1st October, 1949. Thereafter he took prompt action and by so doing, in my opinon, repudiated the contract as soon as he could reasonably be expected to do so. But had the interest got into the hands of an innocent third party before plaintiff took steps to repudiate? I think not. The property was conveyed to the latter by the former by a conveyance executed on the 26th August, 1945. The 1st defendant was an enemy subject so that conveyance is void by virtue of section 12 of the Dealings in Land (Occupation Period) Ordinance, 1949.

This is doubtless the reason why the agreement dated the 26th July, 1945, was pleaded and not the conveyance executed on the 26th August, 1945. But this artifice cannot succeed because the agreement merged into the conveyance when the latter was executed[1] and the merger took effect before the conveyance was declared void. This particular point was not taken in the lower Court: if it had been it would have shortened the proceedings considerably. In this Court Mr. Pooley attempted to surmount the difficulty by submitting that the conveyance was void *ab initio* and therefore there was nothing into which the agreement could merge. In my opinion this is not the effect of the Ordinance. As far as we know to the contrary the conveyance was valid and effective until declared to be void on the 1st October, 1949, (the date the Ordinance came into effect). Thus at the time plaintiff instituted this action there was no interest in the hands of any innocent third party.

I am of opinion, therefore, that this appeal must fail for two reasons. Firstly, 1st defendant's title has, in my opinion rightly, been declared void on the ground of duress and, in any event, the title of 2nd defendant was avoided by Statute.

I would dismiss this appeal and would confirm the order made in the Court below. In my opinion respondent should have his costs in this Court and in the Court below and the $500 deposited in Court by the appellant should be paid out to respondent against his costs.

Spenser Wilkinson, J. : — I have had the advantage of reading the judgment of Pretheroe, J., and I am in substantial agreement with his conclusions.

With regard to the third ground of appeal it seems to me that the main features of the Japanese occupation of Malaya have now become a matter of public history, of which judicial notice can be taken. Moreover, such a large body of evidence has been given before the Courts of the Malayan Union and the Federation of Malaya regarding the conditions in the country during the occupation that many of its aspects can be said to be notorious. The occupation of a country by a temporarily victorious enemy is an exceptional circumstance and in considering the question of the inquiries a prudent solicitor ought to make it seems to me quite inadequate to measure his obligations by the test of what inquiries would be usual in normal times of peace. For this reason I agree that in the circumstances which existed the mere fact that the vendor was a Japanese subject and therefore an enemy alien was in itself sufficient to put any solicitor upon his inquiry concerning the title.

Whilst I think that the agreement of the 26th July, 1945 merged in the conveyance executed on the 26th August, 1945 I think there is a further reason,

(1) Chitty on Contract (20th Ed.) 264.

apart from merger, why that agreement cannot stand. Section 12 of the Dealings in Land (Occupation Period) Ordinance, 1949 provides that any dealing by an enemy subject purporting to have been effected after the 12th August, 1945 shall be void. The definition of "dealing" in section 2 of the same Ordinance is as follows :—

"Dealing means a transaction of whatever nature by which land is effected."

I am of opinion that the "transaction" in this case included the whole process of passing of the title to the land in question from the vendor to the final purchaser including the preliminary negotiations therefor, the written agreement and the conveyance. No doubt the agreement, standing by itself, comes within the definition of a "dealing" and there might be circumstances in which a transaction between parties was no more than and was not intended to be more than an agreement for the sale of land effecting a transfer of the equitable interest. That, however, was not the transaction in the present case, and I do not think it permissible to split a transaction into its constitutent parts so as to arrive at the conclusion that one part of it is valid and thus to evade the provisions of the Ordinance. I think the substance of the whole transaction must be looked at. and if was a transaction which was finally effectuated after the 12th August, 1945 then the whole transaction is void by reason of the provisions of section 12.

It was argued on behalf of the appellant that the point regarding merger of the agreement in the conveyance was not open to the respondents on the pleadings. I do not think that there is any substance in this point. Merger is a matter of law and no new facts had to be pleaded to support the proposition that the contract merged in the conveyance. The respondents have in the Statement of Claim specifically pleaded in paragraph 13 that the conveyance was null and void under the provisions of the Dealings in Land (Occupation Period) Ordinance, 1949. If the failure of the respondents specifically to mention merger in their Reply in fact took the appellant by surprise then the objection should have been taken at the trial. The point was clearly raised in the Court below, although apparently not until the very end of the arguments. Had objection been taken at that time the learned judge would no doubt have dealt with the position either by adjournment or by allowing further argument by the respondent on the point or in such manner as he thought fit. As it is, however, the point was raised in the Court below without objection and is specifically mentioned by the learned judge in his judgment. In my opinion, therefore, the point was clearly open to the respondent on this appeal.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed.

SOH CHYE SOON v. BULAT BIN ABU BAKAR & ANOR.

[Court of Appeal (Mathew, C.J., Pretheroe and Briggs, JJ.) May 4, 1952]

[Kota Bharu — Civil Appeal No. 69 of 1951]

Limitation Enactment — Kelantan Limitation Enactment, No. 4 of 1930 — Applicability of.

The facts in this case as found by the learned trial Judge are that the plaintiffs (respondents) bought the piece of land, which was the subject matter of this appeal, about 25 years ago for $60 from one Soh Kee Phian. The appellant attempted unsuccessfully to show that the learned trial Judge was wrong in his findings of fact. The question of limitation was not pleaded and was not argued on the appeal. The only question the Court had to determine was the Kelantan Limitation Enactment, No. 4 of 1930 which came into force on 1st April 1930 should be applied in this case.

Held, that the Limitation Enactment can and should be applied in this case.

Case referred to :—

(1) *The Ydun* (1899) P. 236 at 246.

COURT OF APPEAL.

S. A. Lingam for the appellant.

The arguments appear sufficiently from the judgment of Mathew, C.J.

Cur. Adv. Vult.

Mathew, C.J. :— The appellant (defendant in the proceedings before the High Court in Kelantan Civil Suit No. 89/51) appeals against the decision of the learned trial Judge that she as Administratrix of the Estate of Soh Kee Piaw alias Soh Kee Phian (deceased) should transfer Lot No. 47 Mukim Jal Daerah Jal Besar in the district of Tumpat, to the names of the respondents-plaintiffs.

The facts of the case as found by the learned trial judge are that the plaintiffs bought this piece of land about 25 years ago for $60 from one Soh Kee Phian. The appellant attempted unsuccessfully to show that the learned trial judge was wrong in his findings of fact. The question of limitation was not pleaded and was not argued on the appeal. The only question we have to determine is whether the Kelantan Limitation